

June 23, 1762.

Additional Information

F O R

JOHN CATHCART of London, Merchant, Defender,

A G A I N S T

ALEXANDER BLACKWOOD, Merchant in Edinburgh, Pursuer.

IT is unnecessary to repeat the History of the Misfortunes, by which the Defender, and *John Blackwood*, his Partner, were involved in a considerable Load of Debts, as it has been already fully stated in the Defender's Principal Information, to which a List was subjoined, of Debts of the Copartnery paid by the Defender, out of his own proper Effects, before the Commission of Bankruptcy issued out against them in 1745, to the Extent of 2092 *l.* 16 *s.* 7 *d.* and a further List of Debts, which he has paid out of the Money earned by his Labour and Industry, since he obtained the Lord Chancellor's Certificate, to the Extent of 2479 *l.* 13 *s.* 5 *d.*

The Pursuer, Mr. *Alexander Blackwood*, did acquiesce in the Commission issued out against the Partners, and entered his Claim before the Assignees, and drew his Dividend along with the other Creditors, and yet is now pleased to insist, that he

A

is

is not bound by the Certificate, but is entitled to recover from the Defender the whole Balance of the Debt due to him by the Co-partnery.

And the Pretence suggested for this Claim is, That the Defender did not discover to the Commissioners, two Subjects which belonged to his Father, viz. the Lands of *Glendusk*, and the House in *Edinburgh*. The Defender upon Oath declared, and Mr. *Blackwood*, his Partner, concurred, that he had informed the Commissioners and the Assignees, of the small Farm of *Glendusk*, worth about 10 l. *Sterling per annum*, and adjudged for a Debt above the Value; and the House in *Edinburgh* had been given up by him to his Sister, in lieu of her Provision, so as he did not understand he had any Interest in it, nor the smallest Expectation of Benefit to accrue from it, either to himself or his Creditors.

The Case was stated to your Lordships on Informations, after which an Additional Information was preferred for the Pursuer, and another for the Defender, with Replies and Duplies; and the Pursuer having applied to your Lordships by Petition, for a Proof of the Rental and Value of the Lands of *Glendusk*, a Proof was accordingly allowed; and thereafter, on a second Petition, he obtained a further Diligence, to cite more Witnesses for proving the same. And the Proof being reported, the Cause was remitted to the Lord *Coalston* Ordinary, who, after a full hearing of Parties, pronounced the following Interlocutor:

July 7th,
1761.

The Lord Ordinary having considered the foregoing Minutes of Debate, Informations, Additional Informations, Replies, Duplies, State of the Process, and Affidavit of John Blackwood, which the Pursuer agrees shall have the same Effect as if it had been regularly emitted on Oath, on a Commission from this Court; and having also considered the Opinions of Council learned in the Law of England, produced for both Parties, with the List of Debts alledged by the Defender, and not denied by the Pursuer, to have been paid by the Defender since his Bankruptcy, and whole other
Circumstances



Circumstances of the Case, finds it not proved, that the Defender has been guilty of any such fraudulent Concealment, as is sufficient to deprive him of the Benefit of the Certificate granted by the Commissioners, and confirmed by the Lord Chancellor, and therefore sustains the Defence founded on the said Certificate, assolzies the Defender, and decerns.

Against this Interlocutor, the Pursuer preferred a Representation; and, at a subsequent Calling, he suggested a third Article, *viz.* The Arrears of Half-pay due to the Defender, as Director of the Hospital in the Expedition to the *West Indies*, under Lord *Cathcart*, which the Lord Ordinary appointed the Defender to confess or deny. And thereafter, having considered the Representation, with the Answers thereto, the signed Declaration produced for the Defender, and Minute of Debate relative thereto, his Lordship made *Avifandum* to the whole Lords, and ordained both Parties to lodge their Informations; in Obedience to which, this Information is humbly offered in behalf of the Defender. Nov. 14,
1761.

Jan. 5th,
1762.

The Case was stated with so much Accuracy and Perspicuity in the Defender's first Information, that he apprehends it would be improper to withdraw any Part of it, and therefore shall refer to the Case as there stated, and proceed to consider what has been since offered in behalf of the Pursuer, in the additional Papers and Debate before the Lord Ordinary, for supporting the several Articles from which he would infer this Charge against the Defender.

But before entering into Particulars, there is a preliminary Observation that will naturally occur to your Lordships. In every fraudulent Concealment the Concealer must have two things in view, *First*, that he will be able to hide a Subject, which, if discovered, could be attached by his Creditors. And, *secondly*, that he is to make Profit by concealing the Subject that is so attachable. Without a probable Prospect of both these, it is impossible to suppose a fraudulent Concealment; and there is real Evidence that neither of them could
be

be in the Defender's View in this Case. Personal Effects may in many Cases be easily concealed and secreted, so as there may be Ground to expect they will never come to the Knowledge of the Creditors. But a Man must have lost his Senses before he can flatter himself to conceal a Land Estate, or a Tenement in a Burgh, from his Creditors, residing in the Country where it lies, when he cannot possibly dispose of it without Titles that must appear upon Record, nor possess it, or draw the Profits, without his Possession being notoriously known to the whole Neighbourhood. Such are therefore very improper Subjects for attempting to secrete or conceal; and the Half-pay is no less so, as it must be known to every one concerned in those Departments, and appears from Lists which are daily published, and in every body's Hands.

And as the Half-pay was a Subject not attachable by Creditors, so as there could be any Temptation to conceal it, so it would require a Degree of Credulity beyond what is consistent with common Sense, to lead one to believe that a Man of a fair Character would form a Project of concealing a small Farm or Tenement, when he was not to make a Shilling of Profit by either of them; that he would endanger his Reputation as well as the Effect of the Discharge he was to get by the Certificate, by attempting to secrete two Subjects from which he could never reap any Advantage, as the one was affected by Diligence for Sums above the Value, and the other had been long before given off to his Sister in lieu of her Provision.

But this improbable Story becomes still more incredible, when both the former and after Part of the Defender's Conduct is considered, who, as he bestowed his utmost Care before the Statute was taken out, in applying the whole Effects he could recover, towards Payment of his Creditors, and that to the Extent of upwards of 2000 *l. Sterling*, so after he had obtained his *quietus* by the Certificate, he made no other Use of it but to re-enter upon the same Course of Labour in which he had been formerly engaged, and to apply the whole

Profits

Profits arising from it in Payment of Debts from which he was by Law discharged. This Conduct will never reconcile with the Charge of fraudulent Concealment upon Oath, though it were not attended with the other Circumstances already mentioned, *viz.* that it had no Chance to remain undiscovered, and could not yield the Defender any Benefit, if it did.

The first Article of Concealment, alledged by the Pursuer, Article I.
was the Farm of *Glendusk*, which had belonged to the Defend- Glendusk.
er's Father, and of consequence the Succession devolved to the Defender as his Heir. To this two Answers were made, separately relevant, *First*, That this Farm, of which the Rent was 8*l.* 6*s.* 8*d.* was incumbered by Diligence above the Value. And, *secondly*, that in Fact the Defender mentioned both the Lands and the Incumbrance at his Examination, but they judged it unnecessary to enter a Subject so incumbered into the Surrender: That this is their usual Practice, and was followed by these very Commissioners in the Surrender made by Mr. *John Blackwood*, the Pursuer's Brother, who fairly discovered three Farms belonging to him, that were held under Mortgages equal to their Value; and the Commissioners did not think proper to take these Farms into his Examination and Surrender.

As this Article of *Glendusk* was the only one upon which the Process was at first founded, the Pursuer was at great Pains to investigate it to the utmost, in order, if possible, to make out a Concealment. The Adjudication affecting it, which was led by *Thomas Kennedy* in 1742, upon a Debt due by the De- Aug. 20,
fender, and *John Blackwood* his Partner, was cleared off by the 1747.
Defender in the Year 1747, and conveyed to Captain *Robert Cathcart* for the Defender's Behoof. The Sum paid for it was 309*l.* 18*s.* 3*d.* as appears from the Disposition, being the Principal, Annualrent and Expences, of which an Account is subjoined to the Defender's former Information. This amounts to above thirty Years Purchase of the Farm, if it were supposed to be worth 10*l.* of yearly Rent; but as the Disposition bears, " That Captain *Robert Cathcart* did, for Account

“ of the Defender, pay to Mr. *Kennedy*, at two different
 “ Times, the Sum of 80 *l. Sterling*, which Sum had been
 “ since repaid by the said *John Cathcart* to the Captain, and
 “ that the said *John Cathcart* had then, by the Hands of *James*
 “ *Fergusson* Writer in *Air*, made Payment to him of the Sum
 “ of 229 *l. 18 s. 3 d.* which compleatly satisfies and pays
 “ him, &c.” therefore the Pursuer insisted, that the 80 *l.*
 was to be presumed paid before the Bankruptcy, and conse-
 quently, that the Incumbrance remaining after that Payment,
 was not equal to the Value of the Lands.

But it is believed, this Way of arguing will not have Weight
 with your Lordships. When the Pursuer is insisting to make
 out a Charge of wilful Perjury against the Defender, foresee-
 ing that the Incumbrance exceeds the Value of the Lands, and
 the Incumbrance itself appears far to exceed it. The Pursuer
 will not be allowed to presume, without Evidence, that a Part
 of that Incumbrance was extinguished before the Bankruptcy.
 If he alledges such Extinction, and upon that founds this
 heavy Charge, it is incumbent upon him to prove his Allega-
 tion; it will not be taken for granted without Evidence.

2do, The Allegation is, in part, disproved by the Production
 of Captain *Cathcart's* Bill to *Kennedy*, for the Sum of 37 *l.*
 10 *s.* dated in the Year 1746, of which 20 *l.* is allowed to
 have been a Part of the 80 *l.* paid to Account of this Debt.
 This appeared so satisfactory to the Pursuer himself, that he
 restricted his Alledgeance to the remaining 60 *l.* which he
 still insisted was to be presumed paid before the Bankruptcy,
 unless the Defender will produce the Document of the Pay-
 ment.

This Demand would have been complied with as soon as it
 was made, if the Document had been in the Defender's Custo-
 dy, or in his Power; but as it was in the Hands of Captain
Cathcart, who made the Payment, and has been abroad in his
 Majesty's Service in *Germany*, ever since this Writ was called
 for, it was not in the Defender's Power to recover it; and the
 Pursuer will not be allowed to establish a Presumption against
 him,

him, of a Fact in itself improbable, because he does not produce a Writing which it was impossible for him to recover, unless the Pursuer had thought fit to bring his Process sooner, while the Captain was in the Kingdom. But,

3^{tio}, & *separatim*, If it were to be supposed, without Evidence, that this 60 *l.* was paid before the Bankruptcy, yet it is incontestible that the remaining 229 *l.* 18 *s.* 3 *d.* was paid after it, and was a subsisting Incumbrance upon the Lands at the Time of the Examination, and after the utmost Expiscation that has been so anxiously made by the Pursuer, it will appear that this Sum exceeds the Value of the Farm.

For the Lords have already heard, that since the first Informations were given in, the Pursuer applied by Petition for a Proof of the Rental and Value of the Farm, which was accordingly allowed; and thereafter, on a second Petition, he obtained a further Proof, but has not been able to prove that any higher Rent was ever paid for it than 110 *l.* Scots, for which they were set in the Year 1745; and the Witnesses agree that it was worth no higher Rent. And *Gilbert Macmichan* of *Kilsaintninian*, the only Witness who depones as to the Value, says, That if the Lands held of the Crown, or feu of a Subject, they were worth twenty-five Years Purchase of the free Rent; as they held Ward of a Subject, they were certainly of less Value in the Year 1745, when that Tenure was still in Force: But supposing them worth twenty-five Years Purchase, even of the gross Rent of 110 *l.* without any Deduction, this would amount to no more but 229 *l.* 3 *s.* 4 *d.* which is less than the Sum paid to *Mr. Kennedy* in 1746 and 1747, even supposing the 60 *l.* had been paid before the Bankruptcy, as the Pursuer supposes, though without any Evidence. And,

4^{to}, As it appears, that in every View, this small Farm was incumbered above the Value, so that no Benefit could result from the Discovery to the Creditors; so it also appears, that it was set forth by the Defender to the Commissioners, in the State it then stood, and with the Incumbrance affecting it;
and

and that not only by the Defender's own Declaration upon Oath, but also by the Oath of Mr. *Blackwood*, Brother to the Pursuer, who swears, " That he was present at the Examination of the said *John Cathcart*, before the Commissioners and Assignees to the said Commission of Bankruptcy, and did hear him acquaint the said Commissioners and Assignees, that he had a small Estate in *Scotland*, which was adjudged by the Law there, to one *Thomas Kennedy*, one of the joint Creditors of the said *John Cathcart* and this Deponent, for a Sum larger than the Value of the said Estate or Farm."

17 Jan.
1761.

The Pursuer, in his first Information, was pleased to contest this Piece of Evidence, in respect it was emitted without the Authority of the Court: But, when the Cause was remitted, the Lord Ordinary put it to the Pursuer, Whether he would admit, as Evidence in the Cause, some Affidavits emitted at *London*, and produced as Evidence in this Process. And by a Minute in Process, " The Pursuer does agree, that the Affidavit emitted by his Brother, be sustained to have the same Effect, as if it had been an Oath emitted regularly on a Commission from this Court; but that as to the Affidavit by Mr. *Cathcart* himself, the Defender, the Pursuer cannot admit it to any Effect."

The Oath of Mr. *Blackwood*, which is now admitted to have the same Evidence, as if taken by Authority of the Court, it is hoped, will give the Lords full Conviction, that this Discovery was truly made, as it is the only Evidence that can now be had of the Fact, as the Pursuer thought fit to delay his Action for thirteen Years, after the Certificate was obtained; so that the Commissioners, and the Assignee to the Commission, and the Attorney were all dead, before the Challenge was brought; nor could any Minutes of the Examination be recovered; so he cannot complain, that your Lordships give Credit to the only Evidence that was left to remain, which must give full Conviction, that this Article was not concealed, but disclosed to the Commissioners; though, even if it had not been

been mentioned, the Omission could have done no Prejudice to the Certificate, as it is plain, the Subject was exhausted, by the Diligence affecting it, so as no Benefit could result from it, either to the Defender or his Creditors.

For, as to what is said, that the Adjudication was liable to Objection, for want of a special Charge. This is what the Defender knew nothing of. He does not pretend to judge of the Form of legal Diligence; he told the Fact plainly and honestly to the Commissioners, as he understood it, that the Farm was seized upon by *Thomas Kennedy*, for a Bond of Debt due by him and *John Blackwood*; and he is perswaded, the Lords will not find him guilty of a Crime, or liable in high Penalties, because he did not acquaint them of a Fact, of which he was altogether ignorant.

The other Article, alledged to have been concealed by the Defender, is a small Lodging in *Edinburgh*, which belonged to his Father, and yields about 6*l.* Sterling of Rent. This Subject the Defender never possessed, nor meant to possess or draw any Benefit from it, having given it up immediately after his Father's Death, in favour of his Sister, *Mrs. Campbell*, who continued in the uninterrupted Possession, and uplifted the Rents as long as she lived; and, since her Death, it has remained in Possession of her Daughter. This trifling Subject the Defender had no Notion he had any Title to, after he had so many Years before given it up to his Sister, in Part, though not full Satisfaction of what she was intitled to claim of her Father's Effects.

The Fact cannot be contested; for it appears from the Oath of *Mr. Alexander Macmillan*, who entered to uplift the Rents, upon a Factory granted by the Defender's Father to him, to sell the House in the Year 1723; that he duly applied the whole Rents, either in virtue of the Father's Orders, or to the Defender's Sister, *Mrs. Campbell*, or her Family; but that he is sure, he never paid any Part of them to the Defender. And it appears by the Defender's Letter to his Sister, as far back

Art. II.
House in
Edinburgh

24 Sept.
as 1739.

as the Year 1739, that, besides this small Subject, which Doctor *Wishart* depones would not yield above 50*l.* at a Sale, he resolved to make a farther Satisfaction to her, as soon as he was able. He says, *I doubt not, but Mr. Macmillan remits you the Rent of the House at Edinburgh, as I desired him, which in the mean time is all I can do for you; and when I can do better, it will be a great Pleasure to me to do it.*

It is therefore incontestible, that he never either received, or intended, or expected to receive any Profit or Advantage from this trifling Subject; and the only Ground, upon which the Pursuer lays his Challenge, is, That he was not legally denuded of the Right that was in his Father's *hereditas jacens*, by a formal Deed, but that the Right still remained to him, and could have been conveyed to his Creditors.

But this is an Attempt to fix a Man in a Crime, because he was not thoroughly acquainted with the Forms of Law.—As the Defender never made up any Titles to this House, nor ever possessed it, or meddled with it in any Manner of Way, he understood he had no Manner of Concern with it, after he had given it over in favour of his Sister, and acknowledged under his Hand, as your Lordships have observed from the foregoing Letter, written six Years before the Bankruptcy, that it was less than he thought she was entitled to receive. He understood himself to be as much bound, as indeed he was, in Reality and Justice, as if he had given her the most formal Obligation or Conveyance. He left it to his Sister, not only to possess the House, but also to sell and dispose of it as she had a mind. So Doctor *Wishart* has deposed, “ That some
“ Years ago, finding the Expence of Reparation, and uphold-
“ ing the Roof to be very considerable, he advised Mrs.
“ *Campbell*, that it would be better to sell the House, and that
“ *she desired him to do what he thought proper.*” She had no Doubt of her Powers to dispose of the House: The only Reason why it was not then sold was, that no Purchaser offered. And the Doctor, after consulting with Tradesmen, and find-
ing

ing the Expence of Repairs to decrease, advised Mrs. *Campbell* not to sell it, as he did not think the House could sell for more than 50*l*.

It is plain that Mrs. *Campbell* understood, that she had no precarious Possession, as the Pursuer would suppose, but that her Brother had made a full Surrender of this small Subject to her, to do with it as she pleased, as he had again and again declared, particularly by the above Letter in the Year 1739, and another Letter wrote upon her Death, to her Grandson, *Colin Mackay*, both before mentioned, and by sundry other Letters that cannot now be recovered. After this total Surrender, the Defender had no more Imagination, that he could convey this Subject a second Time to his Creditors, than that he could do any other unfair or *double Deed*, in Defraud of a *jus quæsitum*, established to a third Party by his own Consent.

And the Defender's full Conviction in this Particular, does further appear from his Affidavit, emitted in *December* 1758, in which he declares, that the Farm of *Glendusk*, which he discovered to the Commissioners, was all the real Estate he had, or was entitled unto. He could not expect to hide this House from the Pursuer, who was then upon the Search, and could not fail to discover, that it had belonged to his Father at his Death; but he believed he had no Concern with it, having above twenty Years before given it up to his Sister. This is real Evidence of his Conviction upon that Point, that he did not imagine he had any Concern with this House, to which he had never made up any Title, nor possessed it for one Moment; but had at all Times, by Word and Writ, disclaimed any Interest he had, in favour of his Sister. If he had had any Notion of his having any Right to this House, he could have no Temptation to deny it in his Affidavit, when it could not do him any Service, but, on the contrary, expose him to further Altercation on the Part of the Pursuer.

And

And the Factory granted by the Defender to Doctor *Wishart*, in 1744, does entirely coincide with the true History of the Case above set forth. The Occasion of it was mentioned in the former Information: It was granted with a View to ascertain the Possession to Mrs. *Campbell*, but noways to take any Benefit whatever from it to the Defender. The Factory itself disclaims any such Pretence, as it appoints the Doctor to pay all the Rents and Profits arising from the House, to Mrs. *Campbell*. It was granted solely at her Desire to Doctor *Wishart*, whom she named, and with whom the Defender was not acquainted for several Years after, as appears by the Doctor's Deposition. So this Factory was truly what the Defender ought to have granted, had he been before denuded in favour of his Sister by a formal Deed, as every Assignee is entitled to demand the Cedent's Aid to maintain the Possession, when Titles are not completely made up; and it appears, that both Mrs. *Campbell* and Doctor *Wishart* understood it in this View, as, after the Factory, she had no Doubt of her Power to sell the House, and the Doctor made as little Doubt of accepting a Commission from her for that Purpose, well knowing, that the Factory was granted to him alienably for her Behoof, and to maintain her in Possession of the Right, which had been long before surrendered to her by her Brother.

And therefore, when the Circumstances of the Case are considered, it may be submitted without any Argument, Whether this House can be said to be a Subject that was concealed or embezzled by the Defender, with an Intent to defraud his Creditors, or a Subject from which he or his Family had, or might expect any Possibility of Profit, Benefit or Advantage. These are the Requisites laid down in the Statute 5to *Georgii* I. It justly requires both an *animus fraudandi*, and an *animus lucrandi*. But neither occurs in this Case. The Defender did never at any Time in his Life, either have, or expect to have, any Profit, or Possibility of Profit or Advantage, from this trifling Subject, which he never took up out of

of the *hereditas jacens* of his Father, but from the Beginning disclaimed and renounced in favour of his only Sister, and had acknowledged, under his Hand several Years before the Bankruptcy, that it was by no Means equal to what she had Reason to expect from him, as soon as he was in a Capacity to perform it.

And, as the Defender could not in Justice take any Benefit from this Subject himself, it did not occur to him as a Fund to give up to his Creditors. The Discussion of the legal Validity of Mrs. *Campbell's* Right, so much insisted on by the Pursuer, is truly of no Importance in this Case. The Question is as to the Fairness of the Defender's Conduct. If he had sold the House, and the Disposition wanted the Designation of a Witness, it might have been competent to his Creditors to insist upon the Objection, and compete with the Purchaser. But it surely could not be tenible to charge him with a fraudulent Concealment, because he had omitted to surrender a Subject to his Creditors, in which he believed he had no Interest, though it afterwards came out in another View, through the Omission of a legal Form, with which he was altogether unacquainted.

The Pursuer not choosing to rely upon the above two Articles, for vouching this Charge of Concealment against the Defender, thought fit, as late as the 14th November 1761, to give in a new Condescendence, viz. of the Half-pay due to him, as late Director of the Hospital for his Majesty's Forces, of which he insisted that 96 Days were due to him on the 28th September 1745, when he was examined before the Commissioners, amounting to 48 *l. Sterling*, and yet made no Discovery thereof upon his Examination; and as he was sensible, that this new Condescendence was offered very late, after the Process had depended for Years, he thought it necessary to make an Apology, viz. that the new Discovery was but lately come to his Knowledge, by a Letter from one Mr. *Pinslot* at London, dated 8th September 1761, informing him, that, by

Art. III.
Half-pay.

Enquiry at the Pay-office, he had found, that 96 Days Half-pay was due him on the 28th *Septembir* 1745.

This Excuse is plainly affected. The Pursuer was well acquainted with the Half-pay, many Years before the Process was raised. It was notorious to all the Creditors, and to every one that knew the Defender; and when he was in *Scotland* in 1750 and 1753, he told the Pursuer every thing relating to the Bankruptcy, and, particularly, that *John Blackwood*, his Brother, had been imprisoned for five or six Weeks before the Commission of Bankruptcy, and that the Defender had released him, and, during that Time, and afterwards, maintained him out of his Half-pay. The Fact, as to the Half-pay, was also set forth in the Defender's Information, dated 28th *February* 1759, but was never, during the Course of the Process, founded on as an Article to support the Libel, not because it was unknown to the Pursuer, but because he, as well as the other Creditors, were sensible, that it was not a Subject that could either be attached by Diligence, or surrendered to Creditors as a Fund of their Payment.

Defender's
Declara-
tion, 21st
Nov. 1761.

May 18,
1754.

For your Lordships will know, that this Half-pay is given by his Majesty, merely as a Subsistence to support an Officer, who is not discharged the Service, until he shall be again called upon to serve; and, in consideration of this Subsistence, he is obliged to remain in the Kingdom, and even not to go to any remote Part of it, until he obtain his Majesty's Leave of Absence, which is always granted for a limited Time; accordingly, when the Defender had occasion to go abroad in the Year 1754, upon his private Affairs, he applied for, and obtained his Majesty's Licence to be absent for six Months, at the Expiration of which Time he was bound to appear in Person at the War-office, or to acquaint the Secretary of War of his Return to the Kingdom. The Leave of Absence signed by the Secretary at War is produced in Process.

And therefore, such Half-pay can no more be pretended to be attachable by the Diligence of Creditors, or under a Statute of

of Bankruptcy, than the Pay that is given to any Officer or Soldier, who might fall under the like Circumstances. It is certain that no Creditor, nor Assignee under the Statute, could oblige such Officer to part with his Subsistence, or hinder him to receive it when it falls due; and this Half-pay is in the same Case, as it is granted merely for Subsistence, until he is called upon to serve, the other Half, or the Arrears, being taken away, until he enters upon immediate Service.

The Pursuer, in the Debate before the Lord Ordinary, did not seem to insist so much upon the Half-pay that might thereafter fall due, as a Fund that could be attached or surrendered to the Creditors, but chiefly upon the 48 *l.* said to be due at the Time of the Examination: He said this was a Fund which would have gone to the Defender's Executor, had he died at that Time, and ought, for the same Reason, to have been given up to his Creditors.

But the Pursuer has referred to no Law or Authority that makes a Difference betwixt what is due for past Subsistence, and what may become due for future Subsistence, as long as he shall continue to be intitled to the Half-pay. If the one cannot be attached by Creditors, there appears no Reason why the other should. The Law must presume it applied to the Use to which it was appropriated, *viz.* to the Subsistence and Aliment of the Party intitled to it; and the Pursuer can show no Instance where such Pay, whether bygone or in Time coming, was either surrendered to Creditors, or attached by their Diligence.

And, indeed, there occurs real Evidence, that so it was understood by all Parties concerned. It was notorious to the Creditors, to the Commissioners, and to the Assignees, that the Defender had been employed in this Office: That he was intitled to Half-pay, and in the Course of uplifting it for his Subsistence, and yet not one of them imagined or suggested, that it was a Fund that ought to have been surrendered. Nay the Pursuer himself, though fully apprised of this notorious Fact,

Fact, long before he raised this Process in the Year 1758, no less than *thirteen Years* after the Defender's Examination, did not suggest this as an Article of Concealment; and after the Defender had set forth the Fact in his Information, given in to the Court in the Year 1759, in the plainest Terms, viz.

Original
Informa-
tion, Pages
2 and 3, at
Top.

" That a Commission of Bankruptcy was issued upon the 19th
" *August* 1745, and the Defender had not then the least per-
" sonal Estate to disclose, having nothing left but his *Half-*
" *pay.*" Yet after this open Discovery of the Fact in Court,
which the Pursuer knew well before, he did not think fit to
insist on this as an Article of Concealment, until *November*
1761, when he found the other Articles over-ruled by the
Lord Ordinary's Interlocutor, and thought fit to recur to this
as a last Attempt to support a Challenge too rashly intended,
without any tolerable Foundation.

The Pursuer was pleased, in the last Debate before the Lord
Ordinary, to resume, at length, the Argument formerly in-
sisted on, from the Statutes made in *England* concerning Bank-
rupts. It was said, that, by the Act 1mo, *Jac. I. cap. 15.*
§ 9. it was enacted, " That if, upon the Bankrupt's Exami-
" nation, it shall appear that he has committed any wilful or
" corrupt Perjury, tending to the Hurt or Damage of the
" Creditors of the said Bankrupt, to the Value of 10 *l.* of
" lawful Money of *England*, as above, the Party so offending
" shall or may thereof be indicted in any of his Majesty's
" Courts of Record, and being lawfully convicted thereof,
" shall suffer the Punishments therein mentioned."

Act 5th,
Geo. II.
§ 1.

And by the Act in the 5th of the late King it is pro-
vided, that Bankrupts shall make a full Discovery of all
their Estate and Effects, " Whereby they, or their Fami-
" lies, have, or may have, or expect any Profit, Pos-
" sibility of Profit, Benefit or Advantage whatsoever.—
" And shall deliver up to the Commissioners all such
" Part of their Effects, and all Books, Papers or Writ-
" ings relating thereto, as at the Time of the Examination
" shall

“ shall be in their Possession, Custody or Power.—And in
 “ case of any Default or wilful Omission in not surrendering
 “ and submitting to be examined as aforesaid, or in case
 “ they shall remove, conceal or embezzle any Part of their
 “ Estate, real or personal, to the Value of 20 *l.* or any Books
 “ of Account, Papers or Writings relating thereto, with an
 “ Intent to defraud their Creditors, and being thereof law-
 “ fully convicted by Indictment or Information, shall be deem-
 “ ed and adjudged to be guilty of Felony.”

And another Clause in the Statute was particularly insisted Sect. 7.
 on, which declares, that in case of any Action against a Bank-
 rupt for a Debt due before the Bankruptcy, the Certificate
 and Allowance thereof shall be allowed to be sufficient Evi-
 dence, and a Verdict shall thereupon pass for the Defendant,
 “ Unless the Plaintiff in such Action can prove the said Certi-
 “ ficate was obtained unfairly and by Fraud, or unless the
 “ Plaintiff can make appear any Concealment by such Bank-
 “ rupt to the Value of 10 *l.*”

It was said, “ That these were two distinct Alternatives, and
 “ that any Concealment whatever voids the Certificate, whe-
 “ ther fraudulent, or only by Neglect or Mistake, and that there
 “ was no Hardship if this should hold even in Cases of un-
 “ designed Mistake, since the Law is founded upon Motives
 “ of Humanity and commercial Policy, in favour of such
 “ Bankrupts as are not only innocent with respect to wilful
 “ Secretions, but accurate and exact in the Surrender of their
 “ whole Effects; and as by these Laws the Creditor is barred
 “ from prosecuting his Debtor for Payment of his Debt, the
 “ Defender cannot with Reason insist for the Benefit of a to-
 “ tal Release, unless he comply strictly and specifically with
 “ the Law, which, in every Question betwixt the Bankrupt
 “ and his Creditors, must, by express Statute, be beneficial-
 “ ly construed for the Creditors, 21. *Jac.* I. *cap.* 19.
 “ § 1.”

E

But

But the Pursuer does here very improperly refer to the Clause in the Statute 21 Jac. I. in Aid of his present Plea. The Act, after referring to the Statutes formerly made with respect to Bankrupts, declares, "That all and singular the a-
 "foresaid Statutes and Laws heretofore made against Bank-
 "rupts, and for Relief of Creditors, shall be in all things
 "largely and beneficially construed and expounded for the
 "Aid, Help, and Relief of the Creditors of such Persons
 "as already be, or shall hereafter become bankrupt." This plainly refers to the Statutes then made, which the Legislature could only have under View; and cannot be applied to the Construction of Statutes made above a *Century* after, imposing high Penalties in the Case of Fraud, so as to extend those Penalties to other Cases where no Fraud was committed or intended. Such Construction, which the Pursuer here aims at, is contrary to the general Spirit of the Law, which requires all Penalties to be strictly interpreted, and never to be extended against innocent Persons.

And with respect to the Clauses in the Statutes *imo* Jac. I. and 5to Geo. II. inflicting Punishment on Bankrupts for *wilful and corrupt Perjury*, or for *removing, concealing, or embezzling any Part of their Estate, with an Intent to defraud their Creditors*, it may be submitted to the Lords, without any Argument, that these Clauses are no ways applicable to this Case, where no Part of the Defender's Estate was removed, concealed or embezzled: But the Subjects condescended on support the Charge, had one of them been seized by a prior Creditor for a Debt equal to the Value, and the other possessed by a third Party, and their Right acquiesced in, many Years before the Bankruptcy, and neither of them ever removed, concealed or embezzled by the Defender, who never had in view to make a Shilling of Profit by any one of them.

Nor is there any Foundation for the Construction put by the Pursuer upon the last Clause referred to, (§ 7.) as if it intended to punish a Debtor for an innocent Omission, which
 happened

happened without any Intention either to profit himself or to hurt his Creditors. The Meaning of the Clause is obvious: There are many other fraudulent Devices which may be taken to obtain the Privilege of this Statute, beside that of concealing Effects. To these the first Part of the Clause is adapted, and the Concealment is mentioned in a separate Article, as it was to be limited in case of the Effects exceeding a certain Value. But it is plain from the whole Tenor of the Statute, that no Concealment was meant to be punished, but such as was *wilful*, and done of design to *hurt* the Creditors, and to *profit* the Debitor. No Man can be said to conceal what he does not know at the Time to belong to him, but believes to belong to another.

And indeed, were it otherways constructed, few Instances would occur where a Debitor could be secure of the Benefit of this Statute. If a Merchant of extensive Dealings, as this Defender once was, should happen to be unacquainted of his Right in any particular Subject in any Part of the World, or if he had conveyed away a Subject twenty Years before, or disclaimed his Right to the Succession, as in this Case, and never possessed it for one Moment of Time, yet he would by this Rule, be chargeable with a Concealment, at the Distance of many Years after the Bankruptcy, if it should happen that the Conveyance of the Subject was lost, or liable to any legal Informality, which might avoid it, and intitle his Creditors to attach it.

The whole Plan of the Statute opposes such Construction: The Intent of it is to encourage fair and honest Surrenders to be made by Debtors. When a Man *bona fide* gives up all that he knows to belong to him, without Fraud, the Law judges that his Creditors ought to demand no more, and releases him from all Action at their Instance. It never meant to punish an innocent Mistake in a Man, whose Conduct appears to have been throughout *bona fide* carried on towards his Creditors.

Creditors, and who never meant to take the smallest Profit to himself from any Concealment to their Prejudice.

The Distinction suggested betwixt an innocent Mistake and a fraudulent Concealment, as if the first could infer the Voidance of the Certificate, though the last only can subject him to the other Punishments, has no Foundation in the Act. As the Surrender is made upon Oath, if it is not made fairly in terms thereof, it involves the Crime of wilful Perjury. And if it is fairly made, the Certificate cannot be voided, which would be a very high Punishment, and subject him to rot in Gaol, for Debts which he can never pay, and of which he had obtained a legal Discharge, without any unfair Conduct, on his Part. The Words of the Oath put the Matter beyond all Doubt: He swears, " That he has not removed, concealed " or embezzled, any of his Effects, real or personal, or any " of his Books, Accounts, Papers or Writings, relative there- " to, *with an Intent to defraud his Creditors.*" If there is no such Concealment, which no Mortal can suspect in the present Case, the Oath is fair and true, and the Certificate must, of course, be effectual.

The Pursuer complained, " That the Defender had not " surrendered any Effects to the Commissioners, and that, " though he had alledged, without Evidence, that he had " made large Payments to other Creditors, yet he never " made Payment of any Part of the Debt due to the Pursuer."

But the Reason of this has been already stated to your Lordships, and appears from the Affidavits subjoined to the former Information. The Defender had no personal Estate to surrender to the Commissioners, because he had been at Pains to apply the whole, as fast as it came in, to the Payment of the Creditors. It appears, not only from his own Oath, but also from that of *John Blackwood*, the Pursuer's Brother, which he is willing now to hold as if it had been taken before this Court, that he paid upwards of 2000 *l.* before

fore the Certificate, and upwards of 2400 *l.* since that Time. And the Pursuer has no Reason to dispute the Fact. A List was given in of the particular Debts, and the Persons to whom paid, subjoined to his Information, preferred to this Court, two Years and a half ago; and as it was easy for the Pursuer to enquire at some of the many Creditors, to whom these Debts were paid, so it cannot be thought he neglected it; and as he does not offer any Reason for contesting any of the Particulars, your Lordships will entertain no Doubt that the Payments were truly made, as has been deposed by the Pursuer's Brother, as well as the Defender.

And these Payments, though not made to the Pursuer, must operate the full Effect that is here pleaded from them, *viz.* That the Suspicion, upon which this heavy Charge is founded, is absolutely incredible; that a Debtor should carefully apply, not only the whole Effects he could recover before the Commission, to the Payment of his Creditors, but also, after he had obtained his legal Discharge, go on with the utmost Diligence, to gain what he could, by a most laborious Course of Life, and apply his Gains to their Payment, and yet could be capable of a wilful Concealment, under Oath, of a trifling Subject, with intent to defraud them, when he neither had reaped, nor purposed to reap one Shilling of Benefit from it.

The Pursuer having laid before the Court an Opinion of an *English* Council, the Defender did also apply to an eminent Council, in the highest Station of the Law in that Part of the Island, whose Opinion was subjoined to his former Information; and, as the Pursuer thought fit to object, that the Case had not been fully stated, the Defender did immediately cause lay before the same honourable Council, for his Perusal, both the Pursuer's Informations, along with his own; and, after considering the whole Circumstances of the Case, he still remained of the same Opinion, upon Grounds too solid and firm

to be shaken by any of the Pursuer's Objections, the Tendency of which is, to make the Law operate contrary to its Intention, which was only to punish Fraud, but nowise to inflict a Punishment upon a Party, who appears never to have had any View, either to defraud his Creditors, or to take the smallest Advantage to himself, by concealing any Part of the Effects that belonged to him; but, on the contrary, has applied large Sums to their Payment, arising from his future Acquisitions, after he had obtained a legal Discharge of the Debts.

In respect whereof, &c.

JA. FERGUSON.

